FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1978

JIM ROSE, WARDEN, PETITIONER

v.

JAMES E. MITCHELL and JAMES NICHOLS, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether federal habeas corpus should be available to remedy a denial of equal protection in the selection of a grand jury foreman where the issue has been litigated in the state courts and the state has failed to rebut the prisoners' prima facie showing of racial discrimination.

INTEREST OF THE UNITED STATES

Title IX of the Civil Rights Act of 1964, 42 U.S.C. 2000h-2, provides, *inter alia*, that the Attorney General may intervene in any action in federal court that alleges a denial of equal protection of the laws on account of race or color, and that the Attorney General certifies is of general public importance. The United States has intervened in actions alleging discrimination in jury selection,[1] and has also participated as amicus curiae in this Court in litigation challenging state jury selection practices.[2] In addition, the United States may prosecute persons who exclude citizens from service on state grand juries or petit juries on account of race or color. 18 U.S.C. 243.

This Court's decision last term in *Castaneda* v. *Partida*, 430 U.S. 482 (1977), is the most recent of many cases in which state prisoners have utilized federal habeas corpus to vindicate their right to equal protection in the selection of grand and petit jurors.[3]

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[1] See, *e.g.*, *Turner* v. *Spencer*, 261 F. Supp. 542 (S.D. Ala. 1966).

[2] See Memorandum for the United States as Amicus Curiae, *Duren* v. *Missouri*, No. 77-6067, October Term, 1978, filed July 21, 1978.

[3] See, *e.g.*, *Peters* v. *Kiff*, 407 U.S. 493 (1972); *Hairston* v. *Cox*, 500 F.2d 584 (4th Cir. 1974) (*en banc*); *Smith* v. *Yeager*, 465 F.2d 272 (3d Cir.), cert. denied, 409 U.S. 1076 (1972); *Witcher* v. *Peyton*, 405 F.2d 725 (4th Cir. 1969); *Labat* v. *Bennett*, 365 F.2d 698 (5th Cir. 1966), cert. denied, 386 U.S. 991 (1967); *Ford* v. *Hollowell*, 385 F. Supp. 1392 (N.D. Miss. 1974); *Fuller* v. *Cox*, 356 F. Supp. 1185 (W.D. Va. 1973); *Woods* v. *Beto*, 348 F. Supp. 573 (N.D. Tex. 1972).

While the appropriateness of federal collateral relief to remedy this particular type of constitutional error was not at issue in *Castaneda*, that question is presented in the instant case; petitioner relies on *Stone* v. *Powell*, 428 U.S. 465 (1976), to argue that federal habeas relief should not be available where the state prisoners have not challenged the composition of the petit jury, there is substantial evidence of guilt, and the grand jury issue has been fully and fairly litigated in the state courts. The interest of the United States in this case is premised on the need to maintain the integrity of the jury system and prevent the exclusion of persons from jury service on racial grounds, and on the importance of the availability of federal habeas corpus as a means of accomplishing that goal.

STATEMENT

1. On November 6, 1972, respondents James Mitchell and James Nichols, Jr., were indicted on two counts of murder in the first degree in Tipton County, Tennessee. Prior to trial respondents sought, by pleas in abatement, to dismiss the indictment on the grounds that the grand jury and the grand jury foreman had been selected in a racially discriminatory fashion (App. 1-2). The pleas were denied by the trial court after hearing testimony from the three Tipton County jury commissioners, three former grand jury foremen—including the foreman of the grand jury that had indicted respondents—eleven of the twelve other members of that grand jury, and

the circuit court clerk (App. 3-36). Respondents were tried, convicted, and sentenced to sixty years' imprisonment. The Tennessee Court of Criminal Appeals affirmed the convictions (App. 37-42), and the Supreme Court of Tennessee denied certiorari (App. 42).

The respondents then filed separate petitions for federal habeas corpus in the district court (App. 43-52, 62-73). These petitions were consolidated; the district court declined to conduct an evidentiary hearing, and found that there had been no impropriety in the selection of the grand jury. However, in the selection of the grand jury foreman, the district court held that respondents had made out a prima facie case of racial discrimination, and ordered the state to make further response (App. 98-99). The state submitted two affidavits: one from the foreman himself, indicating that he had not voted on respondents' indictments, and one from the judge who appointed the foreman, disavowing any racial motive in the appointment (App. 105-106, 112-113). On the basis of these affidavits the district court dismissed the petitions (App. 121-122, 124-126).[4] Re-

[4] The district court entered its order dismissing the petitions on February 18, 1977 (App. 123-124). On March 23, 1977, the district court denied respondents' motion for a hearing and for reconsideration. At that time it stated it found further support for its dismissal of the petitions in *Stone* v. *Powell*, and concluded that "since the contention [as to discrimination in the selection of the grand jury foreman] was fairly heard in state court, petitioners are not entitled to another review here" (App. 125-126).

spondents appealed and the court of appeals reversed as to the selection of the foreman (App. 127-141; 570 F.2d 129).

2. Under Tennessee's "key man" system of grand jury selection, the jurors are chosen by three jury commissioners who are, in turn, appointed by a judge. However, the foreman of the grand jury is selected directly by the judge from the eligible population for a two-year appointment. Tenn. Code Ann. § 40-1506 (1975). The foremen are subject to the same statutory qualifications as the grand jurors, except that they must be at least twenty-five years old. Tenn. Code Ann. § 40-1507 (1975). Included among the duties of the foreman are assisting and advising the district attorney in investigating crime, supplying the names of witnesses, issuing subpoenas, administering oaths to witnesses, and indorsing and signing indictments. Tenn. Code Ann. §§ 40-1510, 40-1706 (1975). The foreman serves as the thirteenth member of the grand jury "having equal power and authority in all matters coming before the grand jury with the other members thereof." Tenn. Code Ann. § 40-1506 (1975).

In the instant case the foreman of respondents' grand jury had been asked by the circuit judge to substitute for the regular foreman who was unavailable. The substitute, Peyton Smith, had served previously as a foreman, and according to the circuit judge's affidavit was chosen because of his experience and ability. App. 112-113. Testifying at the hear-

ing on the pleas in abatement, Smith related (App. 23) that he

> usually questions the witnesses first to get basic information to the attention of the members of the Grand Jury and then I ask, after each witness has been examined, if there's anyone in the room that wants to ask any further questions of that witness.

In respondents' case only one witness, the deputy sheriff who had investigated the murders (App. 118), was questioned (App. 24). The grand jury members were then polled to see if they wanted to hear any more testimony before voting, and they did not (*ibid.*). Since the other grand jury members voted unanimously to return the indictment, Smith did not vote (App. 105).[5]

None of the grand jury foremen who testified at the hearing on respondents' pleas in abatement could recall that there had ever been a black grand jury foreman in Tipton County. App. 17-25.[6] In the affidavit of the circuit judge submitted by petitioner in the federal habeas proceedings, the judge stated that there was no black foreman in the five counties in which he appointed foremen, and added that he

[5] In his affidavit, Smith stated that during all his service as grand jury foreman he had voted on only one indictment; in all other cases, true bills were returned based solely on the unanimous vote of the other 12 members (App. 105).

[6] Their experience covered the period from "the early '50's" (App. 20) to the date of the hearing in 1973 (App. 17, 24-25).

had not "really given any thought to appointing a black foreman but I have no feeling against doing so." He also stated that he does not appoint new foremen very often because he usually reappoints them when their two-year term expires and "thus they serve a long time." App. 113.[7]

3. The court of appeals concurred in the district court's conclusion that respondents had proved a prima facie case of racial discrimination in the selection of the grand jury foreman, but disagreed with the court's determination that the state's evidence was sufficient to rebut that case (App. 137). First, the court of appeals pointed out that the circuit judge's affidavit asserting that he acted in good faith and without racial motivation in choosing the foreman is not adequate to rebut a prima facie show-

[7] Respondents' motions to quash their indictments were heard by the same judge whose foreman appointment practices they challenged—Herman L. Reviere, circuit judge for the Sixteenth Judicial Circuit of Tennessee. That circuit also includes Fayette, Hardeman, Lauderdale, and McNairy Counties. At the hearing on respondents' motions, Judge Reviere pointed out that he had been on the bench since 1966 (App. 5). Thus, in the at least fifteen opportunities he had from 1966 until respondents' trial in 1973 to appoint grand jury foremen in the five counties, he had evidently never appointed a black. Census figures for 1970 show the following percentages of black persons twenty-five years of age or over in the five counties: Fayette County—52%; Hardeman County—30%; Lauderdale County—28%; McNairy County—5%; Tipton County—28%. Bureau of the Census, *1970 Census of Population, Characteristics of the Population, Part 44: Tennessee*, Table 35, pp. 109, 112, 116, 117, 124.

ing of systematic exclusion in the selection of grand jurors (App. 137). Second, the court of appeals rejected the district court's conclusion that respondents had not suffered a deprivation of equal protection because the foreman had not voted on their indictments. The court pointed out that the foreman plays a vital role in the functioning of a Tennessee grand jury (App. 138-139; citations omitted):

> He or she is expected to assist the district attorney in investigating crime, may administer oaths to all witnesses, conduct the questioning of witnesses, must indorse and sign all indictments, and like every other chairperson is in a position to guide, whether properly or improperly, the decision making process of the body. Additionally, the indorsement and signature of the foreman or forewoman is indispensible to an indictment in Tennessee, and their absence voids the bill.

Moreover, by statute the foreman is a full member of the grand jury, and the court of appeals observed that a grand jury "which is only twelve-thirteenths constitutional cannot render constitutionally valid indictments" (App. 139).

Finally, the court of appeals, while recognizing the possibility of "insidious and far-reaching" prejudice to respondents, rejected the contention that they were required to demonstrate actual prejudice in order to prevail. App. 140-141. The court pointed out that no such showing of actual harm had ever been required in the context of an equal protection

challenge to the composition of a jury, and went on to state that such a requirement would be inappropriate since the injury sought to be redressed is not merely an injury to the defendants themselves, but to "the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts" (App. 140 (quoting from *Ballard* v. *United States*, 329 U.S. 187, 195 (1946)).

The court remanded the case with directions to release them on the writ unless they were properly reindicted within sixty days (App. 141).

SUMMARY OF ARGUMENT

Federal habeas corpus has long been available to redress denials of equal protection through racial discrimination in state grand jury selection procedures, to safeguard the significant individual and societal values underlying the Fourteenth Amendment. It would be inappropriate for this Court to extend its holding in *Stone* v. *Powell* to preclude consideration by federal courts of Fourteenth Amendment claims of the type presented here because, unlike the exclusionary rule at issue in *Stone*, the remedy sought by the respondents is the primary instrument for correcting the harm done to themselves, to the community, and to the integrity of the jury system by the state's denial of equal protection. In weighing the constitutional interest here against the cost to society of allowing grand jury challenges to be aired by state prisoners on federal collateral

attack, the balance should be struck in favor of permitting such challenges.

Nor should this Court depart from the principle—firmly rooted in close to a century of case law—that a criminal defendant is not required to demonstrate actual prejudice or direct impact on guilt or innocence in order to prevail on a jury discrimination claim. The court of appeals correctly rejected the state's "harmless error" argument on the grounds that application of that doctrine leaves unvindicated the interest of the community at large in maintaining the integrity of the jury system.

ARGUMENT

I.

FEDERAL HABEAS CORPUS RELIEF IS APPROPRIATE WHERE A STATE PRISONER HAS MADE OUT AN UNREBUTTED PRIMA FACIE CASE OF RACIAL DISCRIMINATION IN GRAND JURY SELECTION PROCEDURES AND THE STATE COURTS HAVE NOT REMEDIED THE FOURTEENTH AMENDMENT VIOLATION

A. Habeas Corpus Has Traditionally Been Available To Remedy Denials Of Equal Protection In The Selection Of State Grand And Petit Juries

Where, as here, state prisoners have presented prima facie evidence of the denial of equal protection in jury selection procedures and the state has not rebutted that evidence,[8] federal habeas corpus relief

[8] The district court and the court of appeals were correct in their finding that respondents had made out a prima facie

has long been afforded in cases in which the state courts have failed to redress the wrong.[9]

In *Brown* v. *Allen*, 344 U.S. 443, 470 (1953), this Court reiterated:

> [d]iscriminations against a race by barring or limiting citizens of that race from participation in jury service are odious to our thought and our Constitution.

For that reason, jury discrimination claims[10] have been considered on federal collateral attack whether they are based on total exclusion or substantial un-

case of racial discrimination in the selection of grand jury foremen in Tipton County. The foremen who testified could not recall a black person ever serving in that position (App. 17-25), and the trial judge who made the appointments candidly admitted that he had not "really given any thought to appointing a black foreman." App. 113. The state does not contest the prima facie showing, but argues instead that the evidence of discrimination was rebutted by the judge's affidavit stating non-racial reasons for the appointment of the particular foreman in respondents' case (Pet. Br. 26-27). That evidence was properly rejected by the court of appeals as insufficient (App. 137). See *Alexander* v. *Louisiana*, 405 U.S. 625 (1972); *Turner* v. *Fouche*, 396 U.S. 346, 361 (1970) and cases there cited.

[9] See cases cited at note 3, *supra*.

[10] Since *Strauder* v. *West Virginia*, 100 U.S. 303 (1879), claims of discriminatory selection of grand and petit jurors have been treated as requiring the same analysis and, if demonstrated, justifying the same relief. Accordingly, petitioner's suggestion (Pet. Br. 18) that any defect in the constitution of the grand jury is mooted by the subsequent trial and conviction is contrary to this Court's consistent treatment of grand jury discrimination claims. See *infra*, point II. See also *Pierre* v. *Louisiana*, 306 U.S. 354, 356-358 (1939).

derrepresentation (see *Castaneda* v. *Partida, supra*), and regardless of the race of the state prisoner claiming the denial of equal protection (see *Peters* v. *Kiff, supra*).[11] Federal habeas corpus has been held unavailable in cases of this type only where the grand jury discrimination claim has been foreclosed by a plea of guilty, *Tollett* v. *Henderson*, 411 U.S. 258 (1973), or the state prisoner has failed to comply with the state's procedural rules requiring challenges to the composition of the grand jury to be made prior to trial. *Francis* v. *Henderson*, 425 U.S. 536 (1976). Neither of those limitations applies in the instant case.

B. Values Underlying The Fourteenth Amendment's Equal Protection Guarantee Militate Against Extension of The Rationale Of *Stone* v. *Powell* to Preclude Granting Federal Habeas Relief In Jury Discrimination Cases

The State's argument that this Court's holding in *Stone* v. *Powell* should be extended to grand jury challenges raised in federal habeas corpus petitions fails to take account of the basic difference between the Fourteenth Amendment values implicated here and the evidentiary rule at issue in *Stone*. The starting point for the Court's analysis in *Stone* was its determination that the Fourth Amendment exclusionary rule is a judicially-created remedy designed to deter unconstitutional searches and seizures (428

[11] The fact that the grand jurors here were unaware of either respondents' or the victims' race (App. 31, 33) is therefore irrelevant.

U.S. at 482), rather than to correct a particular constitutional deprivation (*id.* at 486-487). The Court in *Stone* then weighed that deterrent purpose against the cost to society of reconsidering search-and-seizure claims of state prisoners on collateral review, where those claims have already been fully and fairly litigated in the state courts. 428 U.S. at 493-495.

In contrast to an unconstitutional invasion of privacy which cannot subsequently be corrected by the exclusion of the evidence thereby obtained (428 U.S. at 486), the constitutional violation here can be cured by dismissing the indictment returned by the tainted grand jury. The practice of invalidating convictions based on indictments returned by improperly constituted grand juries has for close to a century been the primary and almost exclusive mechanism for redressing the wrong not only to a given defendant, but also to the jury system and to the community at large where equal protection is denied in the selection of members of the grand jury. While the Fourteenth Amendment's equal protection guarantee can be secured to some extent by class actions such as those in *Carter* v. *Jury Commission*, 396 U.S. 320 (1970), and *Turner* v. *Fouche*, 396 U.S. 346 (1970), and by criminal prosecutions brought under 18 U.S.C. 243, the principal vehicle for eliminating discrimination in grand jury selection procedures remains the motion to quash or dismiss an indictment by a defendant who has been charged by that grand jury.

The Court in *Stone* expressly disavowed any intent to redefine the scope of federal habeas "for litigating constitutional claims generally" (428 U.S. at 495, n.37). If, despite this disavowal, this Court now concludes that an analysis similar to that utilized in *Stone* is appropriate here, the societal costs of correcting the constitutional deprivation suffered by these respondents do not, in our view, outweigh the values that are thereby vindicated.

While the state may be correct in describing the costs to it of having to reindict and retry respondents,[12] on the other side of the scale is a constitutional interest substantially more compelling than the questionable incremental deterrent effect of collateral application of the exclusionary rule at issue in *Stone* v. *Powell*. This Court has repeatedly recognized that more is at stake than a particular defendant's entitlement to equal protection where there is a showing of discrimination in the method by which grand jurors are chosen. A fundamental societal value embodied in the Fourteenth Amendment is impaired by such discrimination:

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[12] In at least one significant respect the "cost" to the state in having to reindict and retry respondents is less than it would be in the Fourth Amendment context. In the latter situation, the state would have to exclude evidence that might be highly probative on the issue of guilt because it was obtained in violation of the Fourth Amendment. The state suffers no such deprivation in the instant case, however. It is free to use again any and all evidence produced at respondents' first trial. It can even read the prior grand jury testimony to a new, properly constituted grand jury if its evidentiary rules permit.

> The very fact that colored people are singled out and expressly denied * * * all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

Strauder v. *West Virginia*, 100 U.S. 303, 308 (1879). See also *Smith* v. *Texas*, 311 U.S. 128, 130 (1940). In addition, as this Court observed in *Taylor* v. *Louisiana*, 419 U.S. 522, 530 (1975), the exclusion of significant groups from jury service diminishes confidence in the administration of justice. In keeping with the importance of the values implicated in the Fourteenth Amendment's equal protection guarantee, this Court has described racial discrimination in jury selection procedures as being "at war with our basic concepts of a democratic society and a representative government," *Smith* v. *Texas*, *supra*, 311 U.S. at 130, "odious to our thought and our Constitution," *Brown* v. *Allen*, *supra*, 344 U.S. at 470, and injurious "to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard* v. *United States*, 329 U.S. 187, 195 (1946). Where constitutional considerations of this magnitude are subjected to the weighing process applied in *Stone* v. *Powell*, the balance tips heavily in favor of continu-

ing to allow state prisoners to raise jury discrimination claims in petitions for federal habeas corpus.[13]

[13] There may also be significant differences between this case and *Stone* in the extent to which it is appropriate to rely on the state courts to vindicate the rights involved (428 U.S. at 493, n.35). The record here suggests that federal court review of this particular type of constitutional claim is not mere duplication of judicial effort. Respondents' challenges to the foreman selection procedures were initially heard and decided by the very judge whose appointments they contended were racially discriminatory (see *supra*, note 7); a ruling in respondents' favor would have amounted to an admission by the judge that his own method for choosing the grand jury foreman violated the Constitution.

Respondents fared little better on direct appeal. In 1973 in *Hale* v. *Henderson*, 485 F. 2d 266 (6th Cir.), the court of appeals addressed itself to the issue of racial discrimination in the appointment of grand jury foremen in Shelby County, Tennessee, where no black had ever been appointed by the circuit judge in 150 opportunities. While the court decided *Hale* on other grounds, it expressed substantial concern about appointment methods that resulted in 150 successive instances of white foremen being selected. 485 F. 2d at 269-270. Despite the discussion of this issue in *Hale*, the Tennessee Court of Criminal Appeals, considering respondents' grand jury claims just six months after *Hale* was decided, made no mention of the specific contention raised by respondents concerning selection of the foreman in briefly disposing of their grand jury claims (App. 38-39).

II.

A STATE PRISONER'S ENTITLEMENT TO FEDERAL HABEAS CORPUS WHERE HE HAS MADE AN UNREBUTTED PRIMA FACIE SHOWING OF DISCRIMINATORY JURY SELECTION PROCEDURES IS NOT CONTINGENT ON A DEMONSTRATION OF ACTUAL PREJUDICE

Since its decision in *Strauder* v. *West Virginia*, *supra*, holding that the Equal Protection Clause of the Fourteenth Amendment is violated by the systematic exclusion of persons from service on state grand juries or petit juries on racial grounds, this Court has never required a showing of actual prejudice by one asserting such a claim, whether on direct review or collateral attack, except in one situation.[14] The rationale for this policy is explained in *Hill* v. *Texas*, 316 U.S. 400, 406 (1942) (citation omitted):

> [N]o State is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Constitution, and an Act of Congress passed pursuant to the Constitution, alike forbid. Nor is this Court at liberty to

[14] A state prisoner seeking federal habeas corpus on grounds of alleged discrimination in the selection of the grand jury who has failed to comply with the state's procedural rule requiring such a claim to be made prior to trial must show cause for his failure to assert his rights in a timely fashion in the state proceedings, and he must also show actual prejudice. *Francis* v. *Henderson*, 425 U.S. 536 (1976). The same rule applies to federal prisoners who raise the claim on collateral attack after failing to comply with the requirements of Rule 12(b) of the Federal Rules of Criminal Procedure. *Davis* v. *United States*, 411 U.S. 233 (1973).

grant or withhold the benefits of equal protection, which the Constitution commands for all, merely as we may deem the defendant innocent or guilty. It is the State's function, not ours, to assess the evidence against a defendant. But it is our duty as well as the State's to see to it that throughout the procedure for bringing him to justice he shall enjoy the protection which the Constitution guarantees. Where, as in this case, timely objection has laid bare a discrimination in the selection of grand jurors, the conviction cannot stand, because the Constitution prohibits the procedure by which it was obtained. Equal protection of the laws is something more than an abstract right. It is a command which the State must respect, the benefits of which every person may demand. Not the least merit of our constitutional system is that its safeguards extend to all—the least deserving as well as the most virtuous.

Accord, *Eubanks* v. *Louisiana*, 356 U.S. 584 (1958); *Avery* v. *Georgia*, 345 U.S. 559 (1953); *Patton* v. *Mississippi*, 332 U.S. 463 (1947).

This Court's refusal to concern itself with questions of guilt or innocence in cases of this type reflects its recognition of the multiple interests served by the Equal Protection Clause—interests which are no less harmed by racial discrimination in the selection of a grand jury that indicts a guilty defendant than by such discrimination in the selection of a grand jury that indicts an innocent defendant.

These same considerations militate against application of the "harmless error" doctrine in grand jury

discrimination cases, a contention also advanced by the state (Pet. Br. 28-29). Where the composition of federal grand and petit juries was challenged in *Ballard* v. *United States*, *supra*, this Court stated that "reversible error does not depend on a showing of prejudice in an individual case." 329 U.S. at 195.[15] In this context, guarding against the conviction of the innocent through the use of improper jury selection methods is only one function of federal habeas corpus; application of the "harmless error" doctrine would leave unvindicated the other important Fourteenth Amendment values protected by the writ. Accordingly, a state prisoner's right to seek federal habeas corpus in a jury discrimination case should not depend on a showing of actual prejudice.

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[15] The inapplicability of the harmless error doctrine in this context is also noted by Mr. Justice Stewart, concurring in *Chapman* v. *California*, 386 U.S. 18, 44 (1967):

> In a long line of cases leading up to and including *Whitus* v. *Georgia*, 385 U.S. 545, it has never been suggested that reversal of convictions because of purposeful discrimination in the selection of grand and petit jurors turns on any showing of prejudice to the defendant.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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